ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

November 10, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 03-220

Dear Ms Dortch:

Please find attached comments filed on behalf of the Association for Local Telecommunications Services (ALTS) for submission in the above-referenced docket.

Sincerely,

/s/

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160(c) From Application of Sections 251(c)(3) (4), and (6) In New-Build, Multi-Premises Developments	))))))))	WC Docket No. 03-220

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files its comments in the above-referenced proceeding in response to BellSouth's Petition for Forbearance of Sections 251(c)(3), (4), and (6) to BellSouth facilities used exclusively to serve New-Build, Multi-Premise Developments.[1] ALTS is the leading national trade association representing the interests of facilities-based competitive local exchange carriers (CLECs), whose primary objective is to provide facilities-based competition in the telecommunications market, including voice and broadband and other advanced telecommunications services. For the reasons discussed below, ALTS urges the Commission to reject BellSouth's petition.

In its Petition, BellSouth seeks forbearance from applying sections 251(c)(3), (4) and (6) to BellSouth facilities used exclusively to serve New-Build, Multi-Premise Developments (MPDs) and the services provided over such facilities to the end users

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[1] *In the Matter of Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160(c) From Application of Sections 251(c)(3) (4), and (6) In New-Build, Multi-Premises Developments,* WC Docket No. 03-220 (filed October 8, 2003).

located in such developments.[2] It is unclear exactly what "facilities" might be included in BellSouth's proposal because BellSouth does not specify those for which it is seeking deregulation. BellSouth seems to be borrowing some of the logic applied by the Commission in the *Triennial Review Order* and potentially expanding it to include facilities beyond new fiber deployment and certainly beyond the Commission's definition of fiber to the home ("FTTH"). Moreover, BellSouth defines New-Build, Multi-Premise Developments as those that are newly constructed, but it does not specify that the *facilities* for which it seeks relief are newly constructed. Conceivably, if its petition were granted BellSouth could dedicate some of its already deployed facilities, including copper and coaxial cable, to provide service to an MPD and claim they qualify for forbearance. The Commission should not allow such a result. While the Commission recently determined that ILECs need not unbundle new build FTTH loops, it clearly did not analyze the situation posed by BellSouth, where potentially all facilities used to serve a Multi-Premise Development could be removed from the 251 unbundling list.

BellSouth claims to need additional relief from providing access to facilities, beyond that generously supplied by the Commission already, in order to have sufficient incentive to deploy additional fiber to deliver broadband services and technologies to these MPDs. Although ALTS strongly disagrees with the Commission's decision to deregulate fiber loops as it has, surely the *Triennial Review Order* (along with the substantive changes effectuated by the Commission's *Errata*) provides more than ample relief for BellSouth and other ILECs to continue to invest in their networks, particularly in fiber loops and equipment needed to provide advanced services and other

[2] BellSouth Petition at 1.

telecommunications services. Moreover, BellSouth fails to acknowledge that it and the other Bell Companies have deployed and will continue to deploy fiber, even without the relief granted in the *Triennial Review Order* and certainly without the relief being sought through BellSouth's Petition here and in reconsideration of the *Triennial Review Order*. BellSouth's business units repeatedly assure Wall Street that it has every intention to continue fiber rollout regardless of regulatory constraint.[3]

Forbearing from applying Sections 251(c)(3), (4), and (6) to new-build, MPDs would sabotage facilities-based CLECs, particularly those moving down market and trying to serve small and medium-sized business customers, and will eliminate residential competition in those developments as well. The Commission's rationale for adopting its FTTH rule was to provide incentive for ILECs to deploy more fiber; however, no such rationale would apply to deployment of inferior facilities, such as copper loops. Furthermore, denying CLECs unbundled access to ILEC facilities serving MPDs would severely impair their ability to compete for those consumers. Balancing this impairment

[3] *See, e.g.*, *Are RBOCs Building 'War Chest' for FTTP?*, Xchange Magazine, September 9, 2003 (http://www.xchangemag.com/hotnews/39h9131630.html) (quoting William Smith, Chief Product Development and Technology Officer for BellSouth: "[T]here should be no doubt that BellSouth is serious about fiber to the home. That should be evident given that BellSouth by the end of this year will have more than 1 million FTTC lines deployed. If that's not serious, I don't know what is."); comments of John Goldman, BellSouth Communications Manager, *New Push for Fiber-to-theHome*, Wired News, June 18, 1998, http://www.wired.com/news/technology/0,1282,13094,00.html ("The thing about fiber is that there's practically unlimited speed and capacity available. Essentially, you're attaching a big pipe to the side of the house. Then the customer takes whatever he needs. It's almost self-provisioning. Gigabyte speeds are easily possible over fiber, while substantially lower high-end speeds exist for copper"); comments of Dr. Dave Kettler, executive director for BellSouth Science and Technology , Joint Press Release of BellSouth and Lucent, *Atlanta is first North American site for Fiber-to-the-Home System*, June 3, 1999 (http://www.lucent.com/press/0699/990603.cob.html) ("BellSouth has long been a leader in fiber optic networking and fiber-to-the-home research. We first installed customer homes more than 10 years ago . . .. Since that time, and especially during the last several years, we've made fiber to the curb our preferred solution to providing telecommunications services for new subdivisions. Just this year, we initiated an ambitious program of replacing existing copper lines with fiber to the curb in some 200,000 homes in Atlanta and Miami. BellSouth's latest step provides the final link for an all-fiber connection from our switch all the way to the home, instead of terminating fiber at the curb. Fiber to the home is BellSouth's

with the lack of policy rationale, it is clear that the Commission must reject BellSouth's petition.

I. BELLSOUTH'S PETITION DOES NOT QUALIFY FOR FORBEARANCE UNDER SECTION 10.

BellSouth has titled its petition a request for forbearance; however, it is essentially couching a nonimpairment argument under the guise of forbearance, perhaps because it realizes that it would not satisfy the nonimpairment requirements set forth by the Commission in the *Triennial Review Order*. The Telecom Act was intended to bring competitive choice to consumers. The "impairment" analysis set forth in the *Triennial Review Order*, was designed to determine where competitors are capable of bringing competitive choice to consumers without unbundled access to ILEC-provided network elements. By simply forbearing from the 251(c) obligations, and without proper application of the impairment analysis, customers in MPDs will have no competitive choice and will be beholden to a monopoly provider with no incentive to provide affordable, quality telecommunications services.

Moreover, BellSouth claims merely to be requesting relief from the pricing and collocation requirements of Section 251, stating that its facilities would still be subject to unbundling under Section 271. What a disingenuous statement considering that, in its petition for reconsideration of the Commission's *Triennial Review Order*, it requests the Commission reverse its prior decision and rule that Section 271 no longer applies when network elements have been removed from Section 251 unbundling requirements. BellSouth appears to be talking out of both sides of its mouth in these petitions,

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ultimate platform for satisfying our customers' voracious appetite for bandwidth, an appetite that is growing at exponential rates.").

suggesting here that it is not asking for that much because Section 271 would continue to apply when in reality, it continues its crusade to persuade the Commission to adopt its position that Section 271 should not continue to apply. BellSouth and the other members of the Bell Cartel seem to have decided to throw several darts at the FCC in hopes that something sticks. The logic seems to be that with multiple petitions for forbearance, perhaps the Commission will lose track of one, and, voila, one year after filing, the forbearance petition is 'granted in the breach', due to lack of FCC action.

Section 10 requires the Commission to forbear from applying a regulation if (1) enforcement is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. BellSouth claims that its petition satisfies this three-prong test; however, ALTS disagrees. If BellSouth is allowed to determine the rates by which it will provide its facilities to competitors, then competition in those developments will be all but lost. As a monopoly provider of facilities in the development, BellSouth will attempt to charge monopoly rates to competitors and there would be no competitive force to prevent it. Furthermore, without competitive pressure, BellSouth will have limited incentive to deploy advanced services to captive consumers. Instead, any deployment of advanced services will be targeted only to those customers with competitive choice.

BellSouth argues that the competitive bidding process will prevent competition from being thwarted;[4] however, as CLECs have seen in many scenarios, such as with building owners handling building access and even with local municipalities handling

[4] BellSouth Petition at 9.

rights-of-way access, ILECs often obtain preferential treatment from supposedly unbiased third parties despite their services being inferior to and/or their rates being higher than those of CLECs. Therefore, the Commission should not be persuaded by BellSouth's argument that the competitive bidding process overseen by the developer will provide a check or balance against anticompetitive behavior by the ILECs. Furthermore, the developer is not a totally unbiased party in this process because it is running a business itself and will be looking out for its own best interests, not necessarily those of consumers.

The best result for consumers is to ensure that they have the ability to obtain telecommunications services from the carrier of their choice. Moreover, the fact that there is a competitive bidding process should provide BellSouth with appropriate incentive to consider deploying facilities to serve customers in these new developments. BellSouth suggests that its current regulatory restrictions prevent it from being competitive during this bidding process; however, the Commission should not relieve its regulatory obligations merely to allow BellSouth to become more successful during that process. Such a result is akin to providing BellSouth with protection from competition. Without a requirement to provide unbundled access at TELRIC rates, BellSouth would be able to undercut its competitors during the competitive bidding process, even at a loss to itself (at least in the short-term), in order to ensure that its competitors do not gain access to customers within that development.

Finally, adoption of BellSouth's petition is not in the public interest. It will not further encourage competitors or BellSouth to deploy facilities to these developments as sufficient incentive already exists. And it most certainly will not improve competition as a whole by allowing BellSouth to essentially lock out competitors and be given free reign to charge monopoly rates without any competitive restraint. BellSouth notes that throughout its region there are 109 separate residential and commercial developments, with approximately 47,299 residential locations and 13.3 million square feet of commercial space, where competitors have deployed facilities within a new development. However, BellSouth provides this data almost in a vacuum providing no comparison to the number of similar developments in its region where it has deployed its own facilities within new developments. In fact, BellSouth then notes that approximately 490,000 new housing starts (including both new single-family residences and new multi-tenant dwelling units ("MDUs")) will begin during 2003. When compared to such a large amount of new construction overall, a mere 109 new developments, or just 47,299 residential locations, that now have competitive facilities seems rather paltry. While there may be no true direct comparison between these figures, they do illustrate that BellSouth likely still has more than its fair share of this market, and because BellSouth failed to provide any figures with which to determine the true market penetration of competitors, we must consider the data as it has been provided.

Furthermore, the mere fact that competitors have won the rights to deploy facilities within some new developments shows nothing but that competition is taking hold and that in at least some cases competitive carriers have successfully deployed their own networks into these developments. It does not in any way prove that competitors are unimpaired without access to BellSouth's facilities in the other countless developments where BellSouth will be the victor and will deploy its own new facilities to Multi-Premise Developments because in most cases, BellSouth is and will continue to be in a better position to bargain with a developer than will be a competitive carrier. BellSouth states that it has "no inherent advantage over its competitors when negotiating the right to install facilities, or in actually installing facilities, within New-Build, Multi-Premise Developments;"[5] however, BellSouth may enjoy many advantages over competitors because of, among other things, its already deployed ubiquitous network and its already negotiated access to local rights-of-way.

II. THE COMMISSION MUST PRESERVE COMPETITIVE ACCESS TO MDUs AND OTHER SMALL AND MEDIUM-SIZED BUSINESS LOCATIONS.

Encompassed in BellSouth's petition here is essentially a request to treat fiber loops to MDUs as FTTH and free them of unbundling obligations. The rules adopted in *the Triennial Review Order* properly do not include fiber loops to buildings with MDUs within the definition of loops that receive fiber-to-the-home treatment. ALTS urges the Commission not to change its rule to include fiber to MDUs, where it is especially difficult for competitors to obtain equal access and compete with the incumbent and its first mover advantages. Simply because a customer has the “misfortune” to live in a new MDU should not relegate that customer to the control of a monopoly service provider without competitive pressure.

It is not economical for a LEC to deploy anything other than fiber to a building with multiple dwelling units, thus it is entirely disingenuous for BellSouth to claim it needs this additional deregulatory incentive to deploy fiber to apartment buildings. Conversely, if the FCC were to adopt BellSouth’s request, the ILECs would be able to unilaterally dictate what services are available to captive building owners and their

[5] BellSouth Petition at 2.

tenants. Building owners and their tenants need the ability to obtain services from the carrier(s) of their choice. If BellSouth's requested relief is granted, building owners will have no choice but to use the services made available by the ILEC at whatever monopoly rates the ILEC could extract. More competitors with access to the bottleneck access lines connecting to the building would give building owners greater bargaining power to negotiate rates and services from multiple parties and realize the benefits of a competitive marketplace.

Furthermore, extending loop unbundling relief to multi-tenant environments might arguably subsume strip malls, office parks, and business located within other multi-tenant environments where much of the small business market resides thus denying small and medium-sized businesses the opportunity for competitive alternatives. Without the CLEC ability to access the ILEC's last-mile transmission facility, small business customers will be captive to a monopoly provider. Moreover, these businesses do not have access to a cable modem alternative, which may be available to residential consumers. The RBOCs typically point to the availability of competitive alternatives to ILEC loops when attempting to free themselves of unbundling and other access obligations. By and large, there are no loop alternatives serving the small and medium-sized business market. BellSouth must not be allowed to shoehorn its argument that a cable modem alternative exists in the residential space to deny CLECs access to bottleneck facilities to serve business customers. Nor should the RBOCs be able to point to other intermodal loop alternatives, unless they in fact exist and satisfy the "impairment" analysis required by the Section 251(d)(2) and the Commission's implementation rules set forth in the *Triennial Review Order*. The Bell Companies point to speculative technologies like satellite and power line provisioning. First of all, there is no evidence that these technologies are, or are soon to be, viable substitutes for ILEC-controlled loops. Further, to the extent that these entities provide *bona fide* substitutes for the ILEC-controlled loop, then the impairment analysis will adequately account for them. Until that time, the ILEC loop, be it copper, fiber, or some hybrid thereof, is the essential bottleneck facility serving MTEs and must be made equally available to CLECs.

The Bell Companies and other ILECs typically have facilities in -- and serve -- virtually every building in their service areas. Where the ILECs do not directly serve a new building, the ILEC still wields insurmountable first mover advantages and access to rights of way within the serving area. The ILEC is generally afforded free access to buildings not guaranteed to new entrants. This free and ubiquitous building access is one of the important legacies of monopoly that gives the BOCs and other ILECs tremendous economic advantage over CLECs for voice, broadband and other telecommunications services and creates a significant barrier to facilities-based competitive entry to serve multi-tenant environments. The Commission explicitly recognized this reality in the *Triennial Review Order*.[6] In its discussion on access to multi-tenant premises, the FCC acknowledged that ILECs have first-mover advantages with respect to access to customers in multiunit premises and that no third-party wholesale alternatives to these loops and subloops are available.[7] The FCC wisely stated that, based on the record, the barriers faced by requesting carriers in accessing customers in multiunit premises are not unique to customers typically associated with the enterprise market residing in such

[6] *Triennial Review Order*, ¶¶ 343-358.
[7] *Triennial Review Order,* ¶ 348.

premises but extend to all customers residing therein, including residential or other mass market customers.[8]

Finally, under no circumstances should the Commission allow any relief granted to deploying fiber to residential consumers to contaminate the growing competitive marketplace for business customers. BellSouth's petition proposes to shut off competitive access to a potentially significant portion of the small to medium-sized business market, located in these Multi-Premise Developments, including multi-tenant commercial buildings, mixed use developments, malls, and industrial parks.[9] As this is the fastest growing market for CLECs, clearly such a result would dramatically curtail the ability of CLECs to grow their businesses.

CONCLUSION

For the foregoing reasons, the Commission should reject BellSouth's Petition for Forbearance.

Respectfully Submitted,

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[8] *Id.* ¶ 347.
[9] BellSouth Petition at 2.